

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

JANE DOE, et al., . Civil Action No. 1:05cv701
Plaintiffs, .
vs. . Alexandria, Virginia
YUSUF ABDI ALI, . May 17, 2013
10:10 a.m.
Defendant. .
.

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS: JOSEPH C. DAVIS, ESQ.
DLA Piper LLP (US)
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Reston, VA 20190
and
PAUL D. SCHMITT, ESQ.
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500 Eighth Street, N.W.
Washington, D.C. 20004

FOR THE DEFENDANT: JOSEPH P. DRENNAN, ESQ.
218 North Lee Street
Alexandria, VA 22314-5601

ALSO PRESENT: YUSUF ABDI ALI

OFFICIAL COURT REPORTER: ANNELIESE J. THOMSON, RDR, CRR
U.S. District Court, Fifth Floor
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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

P R O C E E D I N G S

2 THE CLERK: Civil Action 05-701. Jane Doe, et al.,
3 v. Yusuf Abdi Ali. Would counsel please note their appearances
4 for the record.

5 MR. DAVIS: Good morning, Your Honor. Joe Davis and
6 Paul Schmitt of DLA Piper for plaintiffs, Jane and John Doe.

7 THE COURT: Good morning.

8 MR. DRENNAN: Good morning, Your Honor. Joseph Peter
9 Drennan on behalf of the defendant, Yusuf Abdi Ali, who is
10 present before the Court this morning.

11 THE COURT: All right. Now, as you know, this case
12 has been stayed for a long period of time in part to see how
13 the *Samantar* case went and then also to await the Supreme
14 Court's decision on certain legal issues that related to this
15 case. The Supreme Court has now entered its decision, and we
16 asked you-all to appear for a status conference to determine
17 where this case goes from this point on, and so that's what
18 we're here for.

19 Remind me -- and, Mr. Drennan, you're the only
20 attorney who's been on this case, I think, since its
21 beginning -- where were you with discovery in this case when it
22 was stayed?

23 MR. DRENNAN: Your Honor, I would, I would note as an
24 initial matter --

25 THE COURT: No, just answer my -- where were you on

1 discovery?

2 MR. DRENNAN: Where were we on discovery? My client
3 had responded to some written discovery, and my client gave a
4 full deposition, a video deposition. At that time, Cooley
5 Godward was counsel of record. And he gave a full video
6 deposition in Reston, Virginia, back in the spring of 2005.

7 THE COURT: All right. And had you-all proposed
8 discovery to the plaintiffs? Was there outstanding discovery
9 requests to the plaintiffs?

10 MR. DRENNAN: I think -- to be honest, Your Honor, I
11 think there was some limited discovery proposed, and we had, we
12 had requested divulgement of the, of the names of the parties
13 plaintiff, whom Your Honor had allowed to proceed anonymously,
14 and those, those names were divulged to us, and we did receive
15 initial discovery from the plaintiffs in the case, including
16 those identities.

17 However, Your Honor had admonished counsel not to
18 divulge the names of the plaintiffs to my client, and that has
19 really -- at that time had handcuffed us significantly in
20 respect of pursuing full discovery in the case. We don't -- if
21 I can't share with my client information as to who these people
22 are, that poses some significant problems going forward.

23 THE COURT: Well, in the *Samantar* case, all the
24 witnesses and all the parties' names were fully disclosed.
25 They are on a public record. The case went to trial, as you

1 know.

2 Let me hear from plaintiff's counsel. Is there any
3 reason why at this point the identities of the plaintiffs
4 should not be made public?

5 MR. DAVIS: Your Honor, at this point, I believe
6 that, that the plaintiffs would --

7 THE COURT: There has to be a reason, a good reason.
8 These are not secret proceedings in federal court.

9 So there are two questions. One is, is there any
10 reason why their names should not be immediately available to
11 the defendant, and then the second reason -- and again, you
12 know, we have strong case law in the Fourth Circuit, the *Conoco*
13 case, that, you know, we are not a Star Chamber. Everything
14 that goes on in this court is to be open unless there are very,
15 very compelling reasons why they should be sealed. You should
16 know what the compelling reasons are as you stand representing
17 these people.

18 MR. DAVIS: I understand, Your Honor. Your Honor, I
19 believe the initial reason for requesting that the names of the
20 plaintiffs not be disclosed to the defendant himself was for
21 safety concerns, that both defendants (sic) still remain in
22 Somaliland and are concerned for their own safety given what
23 they allege occurred previously at the hands of Mr. Ali.

24 I believe that given that Mr. Drennan is aware of the
25 names of the plaintiffs, that should not prevent him from --

1 should be no impediment to him for beginning the discovery
2 process --

3 THE COURT: You're not answering my question.

4 MR. DAVIS: Sorry.

5 THE COURT: Why are they at this point, in 2013,
6 after we've already had a very public trial with all the names
7 being clearly mentioned, what is the basis for your argument
8 that there is still any real danger or threat to the plaintiffs
9 if their names are known to Mr. Ali?

10 MR. DAVIS: Your Honor, the plaintiffs live in the
11 northwestern area of what is formerly Somalia, in a region
12 called Somaliland.

13 THE COURT: None of the plaintiffs are in the United
14 States?

15 MR. DAVIS: No, ma'am.

16 THE COURT: Oh, then I think we need to get some
17 motions right away in this case. After the Supreme Court has
18 ruled what it's ruled, we don't even have plaintiffs -- at
19 least in *Samantar*, all but, I think, one of the plaintiffs was
20 in the United States.

21 MR. DAVIS: Your Honor, are you referring to the
22 *Kiobel* opinion?

23 THE COURT: Yeah.

24 MR. DAVIS: Absolutely. And actually, the proposal
25 that we are prepared to make today was in light of the *Kiobel*

1 decision, was to suggest that Mr. Drennan be given the
2 opportunity -- Mr. Ali, excuse me, be given the opportunity to
3 file a motion to dismiss limited to the issues raised by the
4 Supreme Court in the *Kiobel* decision. Upon the Court's ruling
5 on that motion, then discovery would begin again, and we would
6 go from there.

7 THE COURT: Well, what if I grant the motion? I
8 assume that it was going to be a motion to dismiss.

9 MR. DAVIS: I assume, I assume as well, Your Honor.
10 However, there are both Alien Tort Statute claims and Torture
11 Victim Protection Act claims raised by the plaintiffs from the
12 suit. So even if Mr. Ali was successful in moving to dismiss
13 the ATS decisions on the basis of the *Kiobel* decision, the
14 Torture Victim Protection Act claims would continue because
15 *Kiobel* does not touch the Torture Victim Protection Act.

16 THE COURT: Well, I want to keep the amount of
17 litigation and costs in this case to a minimum, and the first
18 thing, I go back to the first question, is Mr. Ali has lived in
19 this country for how long?

20 MR. DAVIS: Sixteen years, Your Honor.

21 THE COURT: What, if any, evidence do you have --

22 MR. DAVIS: I'm sorry, that might have been
23 incorrect. I'm sorry, Your Honor. I had thought it was 1996.

24 THE COURT: Mr. Drennan, how long has your client
25 been in the country?

1 MR. DRENNAN: Well, he's been here continuously
2 since -- no, he's been here continuously since, since '96, but
3 he came here -- he was here at the time the regime fell in
4 1991, and then he lived in Canada for a while, and Your Honor
5 may recall one of the issues that's before the Court is a
6 statute of limitations defense --

7 | THE COURT: Statute of limitations.

8 MR. DRENNAN: -- and the plaintiffs had pleaded
9 equitable tolling, and we've already filed with the Court an
10 expert report by a Mr. Chipeur, who's a noted expert on
11 Canadian law in Calgary, who opined that these plaintiffs
12 should have -- could have sued Mr. Ali when he lived openly in
13 Toronto in the early 1990s and did not.

14 So there's a statute of limitations issue. There's
15 the implications that Your Honor just averted to of the *Kiobel*
16 decision.

17 Beyond that, Your Honor, I noted that learned counsel
18 made reference to his clients residing in Somaliland, what was
19 formerly known as Somalia. Your Honor, in January of this
20 year, Secretary Clinton in one of the last actions of her
21 tenure as Secretary of State extended recognition to the
22 Federal Republic of Somalia, and shortly thereafter, the prime
23 minister of Somalia issued a diplomatic letter to Secretary of
24 State John Kerry asking the United States to grant immunity to
25 Samantar, and I know this is not the Samantar case, but that is

1 under consideration right now, remains pending.

2 There's also a petition for certiorari pending before
3 the Supreme Court in the *Samantar* case. The -- when that case
4 last went to conference, the Supreme Court directed the
5 plaintiffs in that case to file a response. The law firm of
6 Akin Gump is still involved in that case. They received an
7 extension. That response is due on the 24th of May.

8 When the case next goes to conference, because the
9 United States intervened in the *Samantar* case, it's highly
10 likely that the Supreme Court will solicit the opinion of the
11 United States about the pending cert petition in *Samantar*.

12 And the reason I mention that, Your Honor, I know
13 that these are distinct cases, but there's an
14 interrelationship, and this case is not at issue. And there
15 are immunity defenses that could be raised with regard to
16 defendant Ali as well.

17 And we certainly concur with the Court's sentiment
18 that the costs of this case be kept to a minimum. You know, my
19 client works as a security guard, Your Honor. My other client
20 was pushed into bankruptcy, and we respectfully submit that
21 depending on what the Supreme Court does in respect of the
22 *Samantar* cert petition, depending upon what the State
23 Department does with respect to the diplomatic letter
24 requesting immunity for *Samantar*, that could have profound
25 implications for my client here before this Court today,

1 Mr. Ali, as well, and this case may be mooted. The government
2 could very well come in and elect to grant, to grant immunity
3 to Mr. Ali as well.

4 And so for all of these reasons, we would
5 respectfully request that the prudent thing to do would be to
6 put the matter over for 90 days. By that time, it would be --
7 continue the stay for 90 days, and by that time, it would
8 become apparent as to where the cert petition is headed in
9 respect of the *Samantar* matter as well as what action the State
10 Department will take with regard to the formal request for
11 immunity.

12 We -- when we learned of the status hearing, one of
13 the first things that has come to mind is to make a request of
14 the Federal Republic of Somalia, which is recognized by the
15 United States as being the sole government of Somalia, that
16 immunity be, be given to Ali as well.

17 And so, Your Honor, for those reasons, we would --
18 and the State Department will act, in all likelihood, they must
19 act on the request from a sovereign state for immunity for a
20 former prime minister with regard to *Samantar*, and we would
21 respectfully request the matter be put over for 90 days because
22 how that all plays out will be apparent by then, and we will
23 not be in the point of having a man who works as a security
24 guard, who's got a wife who's present in the courtroom and four
25 children, that he's going to be in a point where he can't pay

1 his lawyers and he won't have counsel, and then what purpose
2 would that serve?

3 And unfortunately, Your Honor, that's sort of what
4 happened with regard to the *Samantar* matter.

5 THE COURT: All right.

6 MR. DRENNAN: And we would respectfully ask that the
7 matter be stayed for, not for an indefinite period of time but
8 for 90 days, because within that ambit of time, the cert
9 petition will in all likelihood have been ruled on and as with
10 regard to the request for immunity for Samantar, and then we'll
11 follow that with a request with regard to Mr. Ali --

12 THE COURT: Well, you know, one of the things that
13 delayed the *Samantar* case for almost two years was we were
14 waiting for the State Department to express its position one
15 way or the other in that litigation. I don't think we ever did
16 that in this case, or did we?

17 MR. DRENNAN: We actually did, Your Honor.

18 THE COURT: We did that in --

19 MR. DRENNAN: It was in a somewhat different context
20 because in this case, back in 2005, as the Court would recall,
21 the plaintiffs couldn't get here to testify. I had noted their
22 depositions when the case was initially filed in 2004, and the
23 case was essentially non-suited in early 2005. The judge --
24 Your Honor dismissed the case, giving the defendants leave
25 to -- or plaintiffs, rather, leave to refile and to formulate

1 some discovery plan that would allow these plaintiffs to, to
2 testify in that part of the world.

3 Initially, they wanted to testify in Hargeisa, and at
4 that time, there was no government recognized there. I
5 objected. Your Honor actually acceded to that position.
6 Plaintiffs then proposed depositions in Ethiopia, and we
7 objected to that as well for somewhat different reasons,
8 because of impending elections in Ethiopia, because of the
9 impact of the Somali political situation in Ethiopia.

10 And there was violence in Ethiopia. In May of 2005,
11 150 people were massacred after the presidential election
12 there, and shortly thereafter, Your Honor stayed the case --
13 this case pending a -- the procurement by either party of a
14 declaration of interest from the State Department that this
15 case would not be injurious to U.S. foreign policy essentially,
16 and, and it was on that premise that the case was stayed for,
17 for years.

18 And then in the *Samantar* case, as Your Honor will
19 recall, on Valentine's Day 2011, after the case had been
20 remanded from the Supreme Court the first time, the State
21 Department did file a statement of interest, indicating that
22 the case should go forward, and notwithstanding a request from
23 the then transitional government for immunity, the premise
24 being cited by the, by the Justice Department and the State
25 Department in that statement of interest being that

1 Mr. Samantar has resided in the United States for a long time
2 and the second being that there's no recognized government of
3 Somalia.

4 Well, that's all changed now as of January of this
5 year, and respectfully, Your Honor, we think that the State
6 Department may very well have an interest in what's going on in
7 respect of this litigation and as to whether it's appropriate
8 for this litigation to go forward.

9 THE COURT: Then why, why would it not be appropriate
10 for the Court to once again send that communication, which we
11 did in the other case --

12 MR. DRENNAN: Yes.

13 THE COURT: -- to the State Department, asking --
14 giving them sort of one last opportunity to weigh in on this
15 case so that we don't waste time in this respect?

16 MR. DRENNAN: That's essentially what we would be
17 asking for, Your Honor, and we would think that that would be
18 the appropriate thing to do under the existing circumstances
19 and would not be prejudicial to the plaintiffs, because the
20 case having been in the court system for eight-and-a-half years
21 essentially, with the first case having been dismissed because
22 the plaintiffs couldn't come here, that an additional 90 days
23 or thereabouts would not be prejudicial to the plaintiffs and
24 may provide some clarity to the situation and may moot this
25 case.

1 THE COURT: All right.

2 MR. DAVIS: Your Honor, if I may? We've spoken to --
3 let me say first you're looking at and one other attorney is
4 going to be the trial team in this case. There aren't going to
5 be any other DLA Piper attorneys appearing before you, so any
6 suggestion that we have any intention of litigating Mr. Ali
7 into bankruptcy is not what we intend to do. We are just as
8 interested in an efficient operation in this case as he is.

9 With regard to the stay, my colleague and I had
10 spoken to Mr. Drennan last week, and he proposed it. At the
11 time, we believed -- and I believe this is just
12 miscommunication -- that the stay he was requesting would have
13 been indefinite, waiting until the State Department weighed in.

14 MR. DRENNAN: No.

15 MR. DAVIS: Apparently, that is -- I've now learned
16 today that's not the case.

17 What the plaintiffs are concerned about is the same
18 thing as what has happened previously in this case. This case
19 was stayed for six years, waiting for the State Department to
20 weigh in. If Mr. Drennan would like 90 days to have the
21 opportunity to see if he can get the State Department or the
22 U.S. government to weigh in one way or the other, we're
23 prepared to agree to that, but we don't want it to be
24 indefinite.

25 THE COURT: All right, I agree with you. One way or

1 the other, the case has to be resolved, but it would also be,
2 frankly, a travesty for your clients to go through the
3 procedure, go maybe through the trial, have to have their names
4 disclosed, have to testify to what's happened, and then to have
5 it all set aside because the executive branch steps in and says
6 there is a significant international relations diplomacy
7 problem here with a new young republic, we're trying to have,
8 you know, reconciliation, as sometimes happens in these
9 countries that have been torn apart, and this kind of
10 litigation is detrimental and we want you to stop it. It does
11 them no good if they've gone through the process and that's the
12 outcome.

13 So here's what I'm going to suggest: I am going to
14 stay the case. I'm going to ask the two of you, two teams, to
15 see if you can agree to draft a communication to the State
16 Department. I forget whether, I think it was -- I don't
17 recall, I'll have to go through the file, did I send an order
18 or a letter? I did something, I know.

19 But draft one. See if you can agree to that so that
20 we can get the State Department to express their view one way
21 or the other as to whether this case should, you know, go
22 forward.

23 MR. DAVIS: I agree, Your Honor. And we're happy to
24 work with Mr. Drennan on drafting that together.

25 THE COURT: All right.

1 MR. DAVIS: I believe what -- in reading the previous
2 counsel's motion to lift the stay from 2011, one of the issues
3 was that the State Department at that point was not aware
4 whether the Court had officially requested a statement of
5 interest. So I would hope that --

6 THE COURT: It's going to come from me.

7 MR. DAVIS: I understand.

8 THE COURT: I'm going to sign whatever we do.

9 MR. DAVIS: That's what I wanted to confirm.

10 THE COURT: Absolutely. And I just -- oh, I'll have
11 my clerks check as well. I think it may have been a letter. I
12 don't think I ordered the State Department.

13 It was a letter, Mr. Drennan? You should remember
14 what I did.

15 MR. DRENNAN: Your Honor --

16 THE COURT: Because I --

17 MR. DRENNAN: -- no, there was not a formal order
18 directed to the, to the State Department.

19 The stay basically was conditioned upon either party
20 procuring from the State Department a statement of interest
21 that the case going forward would not be contrary to American
22 foreign policy interest, something to that effect. That's what
23 it was.

24 THE COURT: All right. Then put your very wise heads
25 together; see what you come up with. I have no problem on my

1 letterhead issuing a letter to the State Department, to
2 Secretary Kerry or whoever is the appropriate person,
3 requesting, you know, their input on this.

4 It is a sensitive issue. With a new republic that's
5 starting and the hope that it can blossom and that some of
6 these horrible things can stop over there, I would not want,
7 you know, anything going on in the court to interfere with
8 that, and ultimately, since your clients still live there, it's
9 in their best interests to have, you know, peace and security,
10 and if they're still worried about their security even with the
11 new political regime, I mean, that's a factor to be taken into
12 consideration.

13 So at, at this point, I'm going to grant a stay, and
14 I'm going to say 90 days. It may take a bit more time, but as
15 quickly as you can, get a draft of something to me. Hopefully,
16 you can agree. I mean, if you disagree, then send me two
17 drafts, and I'll look and see which I like better or merge the
18 two myself, all right?

19 And as soon as you do that, then we will issue it to
20 the State Department, and I think knowing how State works, you
21 probably need to give them probably 30 to 60 days to respond,
22 something appropriate and respectful. So maybe I should change
23 my mind: 120-day stay from this case, all right?

24 And obviously, keep me posted. If there are any
25 major issues or events that occur within that 120-day period,

1 keep us posted, all right?

2 MR. DAVIS: We will, Your Honor. Thank you.

3 THE COURT: All right.

4 MR. DRENNAN: Thank you, Your Honor. And one last
5 thing.

6 THE COURT: Yeah.

7 MR. DRENNAN: Would the Court be inclined to rule
8 today on the -- on modifying the protective order that
9 basically precludes me from sharing the names of the plaintiffs
10 with my client?

11 THE COURT: Is Mr. Ali a U.S. citizen at this point?

12 MR. DRENNAN: No, he is not. He's an LPR, a legal
13 permanent resident.

14 THE COURT: All right. The employment he has is full
15 time?

16 MR. DRENNAN: Yes.

17 MR. ALI: Yes.

18 THE COURT: Is it with a government agency or a
19 private company?

20 MR. DRENNAN: He works at the airport for a private
21 contractor.

22 THE COURT: All right. There's no evidence of any
23 misconduct by the defendant while he's been in this country?

24 MR. DRENNAN: No. I don't believe he's even so much
25 as gotten a parking ticket in the United States, Your Honor.

1 THE COURT: Is there any -- does the
2 plaintiffs' counsel, do you have any evidence or reason to
3 believe that if Mr. Ali has the names of these people, there's
4 any likelihood that he's going to -- and he's given an order by
5 the Court that he can't divulge those names to anyone, the only
6 person he could discuss the names with would be Mr. Drennan,
7 that he would not follow that direction?

8 MR. DAVIS: With that limitation, I have no reason to
9 believe that he wouldn't follow that direction, but what I'd
10 request, Your Honor, is if we're waiting 120 days for the State
11 Department to weigh in anyway or the State Department may come
12 in in 120 days and recommend the case be dismissed, and given
13 that there won't be any discovery taken during that time, it's
14 an early issue to discuss that now, and we'd propose putting it
15 off until the end of the stay.

16 THE COURT: I will for just another 120 days isn't
17 going to kill anybody, but you need to spend some time then
18 with your clients --

19 MR. DAVIS: I understand.

20 THE COURT: -- and make sure they understand that, I
21 mean, you're going to have to have hard evidence, not just
22 surmising, to suggest any basis for continuing the anonymity of
23 the plaintiffs.

24 MR. DAVIS: We understand, Your Honor, and we will be
25 prepared at the next status conference 120 days from now to

1 deal with that issue again.

2 THE COURT: All right. Well, let's just officially
3 put this back on the book then. We're looking at September,
4 right, for 120 days? Sometime in September?

5 Let's tentatively put this on for a status conference
6 on Friday, September 20. Does that work for everybody?

7 MR. DAVIS: That's fine, Your Honor.

8 THE COURT: All right, that will be at 10:00.

9 MR. DRENNAN: That's agreeable to the defendant. Be
10 at 10 a.m., Your Honor?

11 THE COURT: 10 a.m., um-hum.

12 All right, very good. Then you're all free to go.

13 MR. DAVIS: Thank you.

14 MR. SCHMITT: Thank you, Your Honor.

15 (Which were all the proceedings
16 had at this time.)

17

18 CERTIFICATE OF THE REPORTER

19 I certify that the foregoing is a correct transcript of
20 the record of proceedings in the above-entitled matter.

21

22

23

/s/
Anneliese J. Thomson

24

25